

LAW OFFICE OF
DAVID J. WEINSOFF
138 Ridgeway Avenue
Fairfax, California 94930
tel. 415-460-9760
david@weinsofflaw.com

Via Certified Mailing – Return Receipt

October 16, 2020

Mr. Thomas B. Klein, CEO and Registered Agent
Klein Foods, Inc.
11455 Old Redwood Hwy
Healdsburg, CA 95448-9523

Mr. Larry Solomon, Facilities Manager
Managing Agent
Rodney Strong Vineyards
11455 Old Redwood Hwy
Healdsburg, CA 95448-9523

**Re: Notice of Violations and Intent to File Suit Under the Federal Water Pollution
Control Act (Clean Water Act)**

Dear Mr. Klein, Mr. Solomon, and Managing Agent:

This Notice is provided on behalf of our client, California River Watch (“River Watch”) in regard to violations of the CWA, 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at Rodney Strong Vineyards owned and/or operated by Klein Foods, Inc. (collectively the “Winery”) located at 11455 Old Redwood Highway in Healdsburg, California. Notice is being sent to you as the responsible owners, operators, and managers of the Winery and real property. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from the Winery to Reiman Creek, a tributary to the Russian River, a navigable water of the United States impaired under CWA § 303(d) for “Indicator bacteria, Sedimentation, Siltation, Temperature, Water, Dissolved Oxygen” (*see* the Storm Water Pollution Prevention Plan (“SWPPP”) for the Winery, Section 3.0 “*Facility Information*” and Section 3.1 “*Storm Water Drainage*”).

CWA § 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States unless such discharge complies with various enumerated sections of the Act. Among other things, CWA § 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual National Pollutant Discharge Elimination System (“NPDES”) permit or a general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. § 1342(p). CWA § 402(p), 33 U.S.C. § 1342(p) establishes a framework for regulating storm water discharges under the

NPDES permitting program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. Environmental Protection Agency (“EPA”) has authorized California’s State Water Resources Control Board (“SWRCB”) to issue NPDES permits including general NPDES permits in California.

The SWRCB elected to issue a statewide general permit for industrial dischargers and issued NPDES Permit No. CAS000001, SWRCB Order No. 92-12-DWQ (the “General Permit”) amended it significantly on April 1, 2014 (effective July 1, 2015), pursuant to CWA § 402(p). In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and comply with its terms.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under CWA § 505(a) of the Act. Notice must be given to the alleged violator, the EPA, and the state in which the violations occur. As required by the CWA, this Notice provides notice of the violations that have occurred and continue to occur at the Winery. Consequently, Klein Foods, Inc. and Rodney Strong Vineyards are placed on formal notice by River Watch that after the expiration of sixty (60) days from the date of this Notice, River Watch will be entitled to bring suit in the United States District Court against the Winery for continuing violations of an effluent standard or limitation, NPDES permit condition or requirement, or Federal or State Order issued under the CWA (in particular, but not limited to, CWA § 301(a), § 402(p), and § 505(a)(1)), as well as the failure to comply with applicable water quality standards set forth in the California Toxics Rule (“CTR”), and the North Coast Regional Water Quality Control Board (“RWQCB”) Water Quality Control Plan or “Basin Plan.”

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

- 1. The Specific Standard, Limitation, or Order Alleged to Have Been Violated.**

To comply with this requirement, River Watch notices the Winery of ongoing violations of the substantive and procedural requirements of CWA § 402(p) and violations of NPDES Permit No. CAS000001, (the General Permit) relating to services and operations taking place at the Winery.

The Winery, rather than seeking coverage under an individual NPDES permit, filed a Notice of Intent (“NOI”) agreeing to comply with the terms and conditions of the General Permit. The SWRCB approved the NOI on or about April 6, 1992 and the Winery is assigned Waste Discharge Identification (“WDID”) number 1 49I004524. River Watch, on the basis of eye-witness reports, records publicly available, and/or records in the possession and control of the Winery, contends that in the continuing industrial operations taking place at the Winery, conducted both indoors and outdoors, on a site at which “100% of the industrial area is impervious” (see SWPPP Section 3.0 “*Facility Information*”), where they are subject to rain events, the Winery has

failed to comply, from Annual Reporting Year 2015-2016 to the present, with the strict terms and conditions of the General Permit.

In addition to the alleged violations of the terms and conditions of the General Permit, River Watch alleges violations of the provisions of discharge prohibitions contained in the RWQCB's Basin Plan, which are incorporated by reference as part of the compliance obligations imposed on the Winery under the General Permit (General Permit Section I.C.29).

2. The Activity Alleged to Constitute a Violation.

Full compliance with the mandates of the General Permit is not a mere statutory and regulatory exercise. The lands in and surrounding the Sonoma County Watershed produce a harvest of unparalleled bounty drawing acclaim worldwide. Failing to care for this critical environment as alleged in this Notice is a violation not only of law, but an abrogation of the trust we demand of Sonoma County landowners.

The Winery's "industrial operations, detailed in SWPPP Section 3.0 (*"Facility Information"*), includes "Wine Production, Grape processing/Pressing, Wine Juice Storage, Pomace accumulation, Shipping/Receiving, Loading/Unloading/Material Handling, Hazardous materials storage, Hazardous waste accumulation."

The Winery is classified on the NOI as SIC Code 2084 ("Wines, Brandy, and Brandy Spirits"). Because there is no public record of an SWRCB or RWQCB exemption from the collecting and analyzing of the range of pollutants discharged from the Winery site, without implementing and properly reporting the full range of required sampling and analysis there is no accurate measure by which to determine whether required Best Management Practices ("BMPs") under General Permit Section X are both implemented at the Winery and effective to ensure no unlawful discharge(s) of the pollutants from the Winery to Reiman Creek and the Russian River – waters of the United States.

Having agreed to its terms, the Winery has a continuing burden to demonstrate compliance with each and every applicable provision of the General Permit. River Watch alleges the following actions and inactions as violations of the General Permit:

a. Failure to Properly Sample and Monitor Storm Water Discharges

Under the General Permit, the Winery, as a California Wineries Monitoring Group ("CWMG") Compliance Group Participant, is required to comply with all of the terms of the General Permit including but not limited to the following:

- i. Collect and analyze storm water samples from a Qualifying Storm Event ("QSE") two times per year – once during the first half of the year (July 1 through December 31) and once during the second half of the year (January 1 through June 30) (*see* SWPPP Section 9.4.1. "*Qualifying Storm Event*"). The Winery's Annual Reports identify failures to comply with this sampling requirement:

- The Winery's 2015-2016 Annual Report identifies only one sample taken during the annual reporting year (on March 3, 2016) stating under the "Summary of Explanations" for Questions 3 that "[f]or sampling event on 12/3/2015, Lab did not ship enough sampling kits for outfall 3."
- The Winery's 2016-2017 Annual Report identifies only one sample taken during the annual reporting year (on October 24, 2016) stating under the Summary of Explanation" for Question 3 that "[s]econd sample was not taken for two qualifying storm events for Jan-Jun. On 1/18/17 we were in flooding conditions and 2/1/17 was at the end of the business day. Storm event records have been maintained on site."
- The Winery's 2018-2019 Annual Report identified only one sample taken during the annual reporting year (on February 25, 2019) stating under the "Summary of Explanations" for Question 3 that "[d]id not take a sample from the first half of the reporting year, June-December, due to no discharge from the site. Process drains were diverted to wastewater until late December due to the late harvest and post-harvest cleanup."

River Watch alleges that QSEs throughout these Annual Reporting years occurred during the Winery's "10 hrs. per day, 5 days per week" hours of operation (*see* SWPPP Section 3.0 "*Facility Information*"), providing the Winery the opportunity to comply fully with the General Permit requirements for sampling and monitoring.

- ii. Analyze all collected samples for the following parameters: "(a) Total suspended solids (TSS) and oil and grease (O&G); (b) pH ...; (c) Additional parameters identified [by the Winery] on a facility-specific basis that serve as indicators of the presence of all industrial pollutants identified in the pollutant source assessment ..." (General Permit Section XI.B.6.a.-c.).

River Watch, following review of the Annual Reports and laboratory test results of the storm water samples reported by the Winery on the SWRCB's SMARTs reporting database, alleges the Winery fails to sample and monitor for the full range of pollutants required by the General Permit. In addition to Oil and Grease, Total Suspended Solids, and pH, which is sampled and monitored, the Winery is required to sample and monitor for "additional parameters identified by the Winery on a facility-specific basis that serve as indicators of the presence of industrial pollutants identified in the pollutant source assessment ..." (General Permit Section XI.B.6.c). In its Revised May, 2019 SWPPP, the Winery provides such a comprehensive "*List of Industrial Materials*" that should be identified as "potential pollutant sources" (*see* SWPPP Section 5.0). This potential pollutant list is so significant that River Watch concludes a "reasonable potential analysis" should be conducted by the Winery to determine with accuracy what pollutants are actually on-site, used in industrial operations, and require sampling and monitoring. This list should include arsenic. Revisions to the list require a further amendment to the 2019 SWPPP.

In addition, the General Permit provides in Section III.C. “Discharge Prohibitions” that “[i]ndustrial storm water discharges and authorized NSWs that contain pollutants that cause or threaten to cause *pollution, contamination, or nuisance as defined in section 13050 of the Water Code, are prohibited*” (emphasis added). Water Code § 13050 provides, in relevant part:

(e) “Waters of the state” means any surface water or groundwater, including saline waters, within the boundaries of the state.

(k) “Contamination” means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. “Contamination” includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l) (1) “Pollution” means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) “Pollution” may include “contamination.”

(m) “Nuisance” means anything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.”

River Watch alleges that the discharge of the pollutants copper and zinc from industrial sources such as on-site materials containing zinc or copper and transportation-related activities at the Winery are above CTR level limits and therefore prohibited as “contamination” or “nuisance” under the General Permit. River Watch believes that targeted monitoring/sampling is required at the site to determine whether, and if so to what extent, zinc and copper are being discharged from the Winery directly to the Russian River.¹ The General Permit provides no blanket exclusion for on-site vehicle use. The General Permit, Appendix 2 (“Instructions For No Exposure Certification (NEC)”) mirrors text from the EPA’s “Guidance Manual for Conditional Exclusion from Storm Water Permitting Based on ‘No Exposure’ of Industrial Activities to Storm Water” (EPA 833-B-00-001, June 2000) to provide that “Adequately maintained vehicles” are among the list of “Industrial Materials/Activities Not Requiring a Storm-Resistant Shelter” (see Appendix 2.B.4.d.). In the absence of any sampling for zinc or copper at the Winery, however, it is not possible to determine whether the considerable number of vehicles, both owned/operated and maintained by

¹ Note that sampling of zinc is already acknowledged as a Winery-related pollutant through its participation in the CWMG (see SWPPP Section 1.0 “Introduction”). In the CWMG’s “2014/2015 Annual Group Evaluation Report” dated July 31, 2015, zinc is included under the provisions governing “Analytical Monitoring” - and “concentrations” at some participating winery sites were identified as above the CTR (see Table 2 Analytical Results for Storm Water Samples, California Wineries Monitoring Group, 2014-2015 Monitoring Year).

the Winery, as well as those driven separately by private vendors involved in industrial activities at the site, are “adequately maintained.”

b. Failure to Monitor Discharges from Wastewater Ponds and Implement Effective Erosion Control

The Winery’s “*Industrial Processes*” include the use and operation of the five “waste treatment and collection ponds” (see SWPPP Sections 4.1). BMPs in SWPPP Sections 6.0 (“*Minimum BMPs*”) and 7.0 (“*Advanced BMPs*”) are not detailed sufficiently to determine whether the ponds are lined or unlined, and whether they are sufficient to hold all regulated storm water prior to evaporation, reuse, or recycling at the Winery.²

The Winery’s “*Erosion and Sediment Controls*” identified in SWPPP Section 6.5 are not detailed sufficiently to determine whether the roadways used for the trucking of supplies to, from, and within the Winery are constructed and maintained to properly control storm water discharges from the Winery.

c. Failure to Comply with Receiving Water Limitations and Discharge Prohibitions

The General Permit requires dischargers to ensure that industrial storm water discharges and authorized NSWDS do not: (a) cause or contribute to an exceedance of any applicable water quality standards in the Russian River including its tributaries (General Permit Section I.E.37, VI.A.), (b) adversely affect human health or the environment (General Permit Section VI.B.) and, (c) do not contain pollutants in quantities that threaten to cause pollution or a public nuisance (General Permit Section III.C., VI.C.). The Winery provides no evidence of complete compliance with these requirements for the Winery’s transportation-related areas.

d. Failure to Comply with Total Maximum Daily Loads (TMDLs) Requirements

The Russian River and its tributaries are listed under CWA § 303(d) as impaired for Indicator bacteria, Sedimentation, Siltation, Temperature, Water, and Dissolved Oxygen. When

² The inadequacy of the Winery’s BMPs for “*Spill and Leak Prevention and Response*” (see SWPPP Section 6.3) was evidenced on January 22, 2020, when “the racking door on a large wine storage tank (approximately 100,000-gallon) in the blending building at the facility catastrophically failed, bursting open with such force that it damaged an adjacent stainless-steel wine tank. This resulted in the rapid release of approximately 97,000 gallons of wine. The wine flooded the blending building, overwhelmed the small French drain system in the building designed to convey small spills to the onsite process wastewater pond, flowed out the rollup doors on both ends of the building, flowed across approximately 180 feet of soil on one end, and approximately 20 feet of concrete and soil at the other end, and entered nearby Reiman Creek. When Regional Water Quality Control Board staff visited the site on the following day ..., they observed wine staining approximately 4 feet high on the outside of the tanks ...” Letter dated September 22, 2020 from Heaven Moore, P.E., North Coast Regional Water Quality Control Board Senior Water Resource Control Engineer – NPDES Unit, to Mr. Tim Burgess and Mr. Larry Solomon, Klein Foods, Inc. – Rodney Strong Vineyards, providing “Notice of Violation of State Water Resource Control Board Order No. 2014-0057-DWQ General Permit for Stormwater Discharges Associated with Industrial Activities (Industrial General Permit), and Waste Discharge Requirements (WDRs) Order No. 88-54, and the Federal Clean Water Act Section 301.

the Winery applied for NOI coverage under the General Permit, it was required to submit data and/or information, prepared by a Qualified Industrial Storm Water Practitioner demonstrating that the Winery: (1) eliminated all exposure to storm water of the pollutants for which the water body is impaired, has documented the procedures taken to prevent exposure onsite, and has retained such documentation with the SWPPP at the Winery, (2) the pollutant for which the water body is impaired is not present at the Winery, or (3) the discharge of any listed pollutant will not cause or contribute to an exceedance of a water quality standard (General Permit Section VII.B.). River Watch could find no documentation demonstrating compliance with these requirements.

The Winery deposits biosolids from its waste treatment and collection ponds to land adjacent to a tributary of the Russian River. Although this is a long-standing practice, the Winery has never conducted any field scale load data studies which are needed to better understand nutrient transport mechanisms and sources of variability as affected by soil, land use, climate, topography, and management. Water quality protections, as detailed in the General Permit, require nutrient loading and export data to prevent excess nutrient loading and the resulting impacts of accelerated eutrophication and degraded aquatic habitat in downstream water bodies.

e. Failure to Prepare and Implement an Adequate SWPPP

The SWPPP for the Winery fails to include a sufficient narrative assessment of all areas of industrial activity with potential industrial pollutant sources: (i) likely to be present in industrial storm water discharges and authorized NSWDS, (ii) the degree to which the pollutants associated with those materials may be exposed to, and mobilized by contact with, storm water, and (iii) the identification of the industrial pollutants related to the receiving waters with CWA § 303(d) listed impairments or approved TMDLs that may be causing or contributing to an exceedance of a water quality standard in the receiving waters (General Permit Section X.G.2.i, iv, and ix). Although the Winery has identified certain facility-specific activities known to create pollution, it fails to identify additional parameters associated with these facility-specific industrial pollutants. For example, the Winery identifies transportation activities taking place at the Winery but fails to test for copper or zinc which are known pollutants from tires, brake pads, fuels and lubricants. The Winery has also failed to identify or test for these transportation-related pollutants in the parking lots, vehicle storage area(s), or other transportation surfaces at the Winery.

The SWPPP also fails to address that the operations and buildings at the Winery site are a significant source of toxic zinc and copper pollution flowing into waterways. In addition to transportation-related zinc pollutants, Winery buildings support extensive galvanized roofing. Conventional zinc-coated steel roofs such as those at the Winery release between 1.0 to 3.0 mg/L (1,000 to 3,000 µg/L) of zinc in stormwater runoff. The Russian River is a salmonid migration and spawning stream. Zinc and copper flowing into waterways at levels above the CTR have adverse effects on marine life. Dissolved zinc in waterways reduces growth and impairs fertility in salmon and other aquatic organisms. Copper has a number of adverse effects on fish sensory systems, predator avoidance behaviors, juvenile growth, and migratory success.

Finally, the Facility Site Map (available on the SMARTS database as Attachment ID 1495567) but not included in the Revised 2019 SWPPP, fails to provide the detailed list of information required by the General Permit, specifically, (a) sufficient notes, legends, and other

data as appropriate to ensure the map is clear, legible and understandable, (b) the actual site-facility boundary, storm water drainage areas within the site-facility boundary, and portions of any drainage area impacted by discharges from surrounding areas, (c) the flow direction of each drainage area, on-facility surface water bodies, areas of soil erosion, and location of nearby water bodies (such as rivers, lakes, wetlands, etc.) or municipal storm drain inlets that may receive the Winery's industrial storm water discharges and authorized NSWDS, all the locations of storm water collection and conveyance systems, associated discharge locations, and direction of flow, (d) the locations and descriptions of structural control measures such as catch basins, berms, detention ponds, secondary containment, oil/water separators, diversion barriers, and (e) the identification of all impervious areas of the Winery including paved areas such as roads, parking lots, vehicle storage areas and the like (General Permit Section X.E.).

3. The Person or Persons Responsible for the Alleged Violation.

The entities responsible for the alleged violations are Klein Foods, Inc. and Rodney Strong Vineyards as owner and operator of the Winery and real property underlying the Winery.

4. The Location of the Alleged Violation.

The location of the various violations is the permanent address of the Winery at 11455 Old Redwood Highway in Healdsburg, California, including the waters of Reiman Creek and the Russian River – waters of the United States.

5. The Date or Dates of Violation or a Reasonable Range of Dates During Which the Alleged Activity Occurred.

The range of dates covered by this Notice is October 16, 2015 to the present. This Notice includes all violations which occur after the range of dates covered by this Notice up to and including the end of trial. Some of the violations are continuous in nature, therefore each day constitutes a violation.

6. The Full Name, Address, and Telephone Number of the Person Giving Notice.

The entity giving this Notice is California River Watch, an Internal Revenue Code § 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, with headquarters located in Sebastopol, California. River Watch's mailing address is 290 South Main Street, #817, Sebastopol, California 95472. River Watch is dedicated to protecting, enhancing and helping to restore surface water and groundwaters of California including coastal waters, rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and to educating the public concerning environmental issues associated with these environs.

River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be directed to:

David Weinsoff, Esq.
Law Office of David Weinsoff
138 Ridgeway Avenue
Fairfax, CA 94930
Tel. 415-460-9760
Email: david@weinsofflaw.com

REMEDIAL MEASURES REQUESTED

River Watch believes that at a minimum, implementing the requirements of the General Permit as outlined in this Notice is necessary in order to bring the Winery into compliance with the CWA and reduce the biological impacts from its non-compliance upon public health and the environment.

CONCLUSION

The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch may use the affected watershed for recreation, fishing, swimming, hiking, photography, nature walks and/or the like. Their health, use, and enjoyment of this natural resource is specifically impaired by the Winery's alleged violations of the CWA as set forth in this Notice.

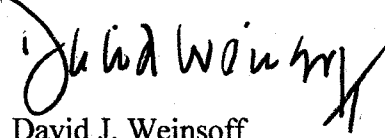
The General Permit, in the very first "Standard Condition," states that "Dischargers shall comply with all standard conditions in this General Permit. Permit noncompliance constitutes a violation of the Clean Water Act and the [California] Water Code and is grounds for enforcement action and/or removal from General Permit coverage" (General Permit Section XXI.A). The gravity of ensuring that the Annual Reports submitted to the State of California are complete and accurate is highlighted by the General Permit requirement that the person signing and certifying the document certifies that "to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations" (General Permit Section XXII.L).

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. §1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$55,800.00 per day/per violation pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4. River Watch believes this Notice sufficiently states grounds for filing suit in federal court under the "citizen suit" provisions of CWA to obtain the relief provided for under the law.

The CWA specifically provides a **60-day** "notice period" to promote resolution of disputes. In the absence of further productive discussions to resolve this dispute, or receipt of additional information demonstrating the Winery is in compliance with the strict terms and conditions of the General Permit, River Watch will have cause to file a citizen's suit under CWA § 505(a) when the

60-day notice period ends.

Very truly yours,



David J. Weinsoff

DW:lm

Service List

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Washington, D.C. 20460

John W. Busterud, Regional Administrator
U.S. Environmental Protection Agency
Pacific Southwest, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Eileen Sobeck, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Klein Foods, Inc.
c/o Rodney Strong Wine Estates
P.O. Box 6010
Healdsburg, CA 95448-6010